United Nations A/73/556

General Assembly

Distr.: General
13 November 2018

Original: English

**Seventy-third session**
Agenda item 82

# Report of the International Law Commission on the work of its seventieth session

## Report of the Sixth Committee

*Rapporteur*: Ms. Nadia Alexandra **Kalb** (Austria)

## I. Introduction

1. The item entitled "Report of the International Law Commission on the work of its seventieth session" was included in the provisional agenda of the seventy-third session of the General Assembly pursuant to Assembly resolution 72/116 of 7 December 2017.

2. At its 3rd plenary meeting, on 21 September 2018, the General Assembly, on the recommendation of the General Committee, decided to include the item in its agenda and to allocate it to the Sixth Committee.

3. The Sixth Committee considered the item at its 20th to 30th and 35th meetings, from 22 to 26 October, on 30 and 31 October and on 13 November 2018. The views of the representatives who spoke during the Committee's consideration of the item are reflected in the relevant summary records.[1]

4. For its consideration of the item, the Committee had before it the report of the International Law Commission on the work of its seventieth session (A/73/10).

5. The Chair of the International Law Commission at its seventieth session introduced the report of the Commission on the work of that session: chapters I to V, XII and XIII at the 20th meeting, on 22 October, chapters VI to VIII at the 24th meeting, on 25 October, and chapters IX to XI at the 28th meeting, on 30 October.

[1] A/C.6/73/SR.20, A/C.6/73/SR.21, A/C.6/73/SR.22, A/C.6/73/SR.23, A/C.6/73/SR.24, A/C.6/73/SR.25, A/C.6/73/SR.26, A/C.6/73/SR.27, A/C.6/73/SR.28, A/C.6/73/SR.29, A/C.6/73/SR.30 and A/C.6/72/SR.35.



Please recycle

# II. Consideration of proposals

## A. Draft resolution A/C.6/73/L.22

6. At the 35th meeting, on 13 November, the representative of Peru, on behalf of the Bureau, introduced a draft resolution entitled "Report of the International Law Commission on the work of its seventieth session" (A/C.6/73/L.22). The Committee also had before it a statement submitted by the Secretary-General in accordance with rule 153 of the rules of procedure of the General Assembly concerning the programme budget implications of draft resolution A/C.6/73/L.22 (A/C.6/73/L.29).

7. At the same meeting, the Committee adopted draft resolution A/C.6/73/L.22 without a vote (see para. 12, draft resolution I).

## B. Draft resolution A/C.6/73/L.23

8. At the 35th meeting, on 13 November, the representative of Belarus, on behalf of the Bureau, introduced a draft resolution entitled "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (A/C.6/73/L.23).

9. At the same meeting, the Committee adopted draft resolution A/C.6/73/L.23 without a vote (see para. 12, draft resolution II).

## C. Draft resolution A/C.6/73/L.24

10. At the 35th meeting, on 13 November, the representative of Georgia, on behalf of the Bureau, introduced a draft resolution entitled "Identification of customary international law" (A/C.6/73/L.24).

11. At the same meeting, the Committee adopted draft resolution A/C.6/73/L.24 without a vote (see para. 12, draft resolution III).

# III. Recommendation of the Sixth Committee

12. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolutions:

## Draft resolution I
## Report of the International Law Commission on the work of its seventieth session

*The General Assembly*,

*Having considered* the report of the International Law Commission on the work of its seventieth session,[1]

*Emphasizing* the importance of furthering the progressive development and codification of international law as a means of implementing the purposes and principles set forth in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[2]

*Recognizing* the desirability of referring legal and drafting questions to the Sixth Committee, including topics that might be submitted to the International Law Commission for closer examination, and of enabling the Sixth Committee and the Commission to enhance further their contribution to the progressive development and codification of international law,

*Recalling* the need to keep under review those topics of international law which, given their new or renewed interest for the international community, may be suitable for the progressive development and codification of international law and therefore may be included in the future programme of work of the International Law Commission,

*Recalling also* the role of Member States in submitting proposals for new topics for the consideration of the International Law Commission, and noting in this regard the recommendation of the Commission that such proposals be accompanied by a statement of reasons,

*Reaffirming* the importance for the successful work of the International Law Commission of the information provided by Member States concerning their views and practice,

*Recognizing* the importance of the work of the special rapporteurs of the International Law Commission,

*Welcoming* the holding of the International Law Seminar, and noting with appreciation the voluntary contributions made to the United Nations trust fund for the International Law Seminar,

*Acknowledging* the importance of facilitating the timely publication of the *Yearbook of the International Law Commission* and of eliminating the backlog,

*Stressing* the usefulness of focusing and structuring the debate on the report of the International Law Commission in the Sixth Committee in such a manner that conditions are provided for concentrated attention to each of the main topics dealt with in the report and for discussions on specific topics,

---

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10).

[2] Resolution 2625 (XXV), annex.

*Wishing* to enhance further, in the context of the revitalization of the debate on the report of the International Law Commission, the interaction between the Sixth Committee as a body of governmental representatives and the Commission as a body of independent legal experts, with a view to improving the dialogue between the two bodies,

*Welcoming* initiatives to hold interactive debates, panel discussions and question time in the Sixth Committee, as envisaged in General Assembly resolution 58/316 of 1 July 2004 on further measures for the revitalization of the work of the Assembly,

*Welcoming also* the seventieth anniversary commemorative meetings held in New York and Geneva, which took place under the overarching theme of "70 years of the International Law Commission — Drawing a balance for the future", as well as the discussions which took place, inter alia, on the working methods of the Commission,

1. *Takes note* of the report of the International Law Commission on the work of its seventieth session;[1]

2. *Expresses its appreciation* to the International Law Commission for the work accomplished at its seventieth session, and notes in particular:

(a) The completion of the second reading of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties;[3]

(b) The completion of the second reading of the draft conclusions on identification of customary international law;[4]

(c) The completion of the first reading of the draft guidelines on the protection of the atmosphere;[5]

(d) The completion of the first reading of the draft Guide to Provisional Application of Treaties;[6]

3. *Recommends* that the International Law Commission continue its work on the topics in its current programme of work, taking into account the comments and observations of Governments, whether submitted in writing or expressed orally in debates in the Sixth Committee;

4. *Draws the attention* of Governments to the importance for the International Law Commission of having their views by 31 December 2018 on the various aspects of the topics on the agenda of the Commission, in particular on all the specific issues identified in chapter III of its report, regarding:

(a) Peremptory norms of general international law (*jus cogens*);

(b) Immunity of State officials from foreign criminal jurisdiction;

(c) Protection of the environment in relation to armed conflicts;

(d) Succession of States in respect of State responsibility;

5. *Also draws the attention* of Governments to the importance for the International Law Commission of having their comments and observations on the

[3] See *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), chap. IV, sect. E.

[4] Ibid., chap. V, sect. E.

[5] Ibid., chap. VI, sect. C.

[6] Ibid., chap. VII, sect. C.

draft articles on crimes against humanity, adopted on first reading by the Commission at its sixty-ninth session;[7]

6. *Further draws the attention* of Governments to the importance for the International Law Commission of having their comments and observations by 15 December 2019 on the draft guidelines on the protection of the atmosphere and on the draft Guide to Provisional Application of Treaties, adopted on first reading by the Commission at its seventieth session;[8]

7. *Takes note* of the decision of the International Law Commission to include the topic "General principles of law" in its programme of work,[9] and encourages the Commission to continue the examination of the topics that are in its long-term programme of work;[10]

8. *Encourages* the International Law Commission to take into account the capacity and views of Member States when including topics in its current programme of work;

9. *Takes note* of paragraphs 368 to 370 of the report of the International Law Commission and notes, in particular, the inclusion of the topics "Universal criminal jurisdiction" and "Sea-level rise in relation to international law" in the long-term programme of work of the Commission,[11] and in this regard calls upon the Commission to take into consideration the comments, concerns and observations expressed by Governments during the debate in the Sixth Committee;

10. *Also takes note* of the holding of the first part of the seventieth session of the International Law Commission at United Nations Headquarters, in New York, from 30 April to 1 June 2018, which coincided with the commemoration of the seventieth anniversary of the Commission, and of the second part of the session at the United Nations Office at Geneva, from 2 July to 10 August 2018;

11. *Further takes note* of paragraphs 331 to 362 of the report of the International Law Commission and commends the convening of the seventieth anniversary commemorative meetings in New York on 21 May 2018 and in Geneva on 5 and 6 July 2018, and also expresses its appreciation to the Member States, the academic institution and others, which have made financial contributions and contributions in kind to facilitate the commemoration of the seventieth anniversary of the Commission;

12. *Takes note* of paragraph 382 of the report of the International Law Commission, and requests the Secretary-General to continue his efforts to identify concrete options for support for the work of special rapporteurs, additional to those provided under General Assembly resolution 56/272 of 27 March 2002;

13. *Welcomes* the efforts of the International Law Commission to improve its methods of work,[12] and encourages the Commission to continue this practice;

---

[7] Ibid., *Seventy-second Session, Supplement No. 10* (A/72/10), para. 43.

[8] Ibid., *Seventy-third Session, Supplement No. 10* (A/73/10), paras. 76 and 88.

[9] Ibid., para. 363.

[10] The following topics are currently in the long-term programme of work of the International Law Commission: "Ownership and protection of wrecks beyond the limits of national maritime jurisdiction", "Jurisdictional immunity of international organizations", "Protection of personal data in transborder flow of information", "Extraterritorial jurisdiction", "The fair and equitable treatment standard in international investment law", "Settlement of international disputes to which international organizations are parties", "Evidence before international courts and tribunals", "Universal criminal jurisdiction" and "Sea-level rise in relation to international law".

[11] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 369.

[12] Ibid., *Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 370–388.

memorandums and studies on topics on the agenda of the Commission, and takes note of the requests of the Commission to the Secretariat to reissue the memorandum on ways and means for making the evidence of customary international law more readily available[13] to reflect the text of the draft conclusions and commentaries on identification of customary international law adopted on second reading, and to prepare a memorandum providing information on treaties which may be of relevance to its future work on the topic "Succession of States in respect of State responsibility", contained in paragraphs 364 and 365 of the report of the Commission;

27. *Also reaffirms* its previous decisions concerning the documentation and summary records of the International Law Commission;[14]

28. *Takes note* of paragraph 386 of the report of the International Law Commission, recalls the paramount importance of multilingualism as set forth in General Assembly resolutions 69/324 of 11 September 2015 and 71/328 of 11 September 2017 on multilingualism, underlines the importance of having the documents of the Commission published in due time in the six official languages of the United Nations, and to this end requests special rapporteurs to submit their reports within the time limits specified by the Secretariat;

29. *Stresses* the need to expedite the preparation of the summary records of the International Law Commission, and welcomes the continuation of the measures taken to streamline the processing of summary records during the sixty-fifth session of the Commission,[15] which have led to a more rational use of resources, and expresses its satisfaction that the summary records of the Commission, constituting *travaux préparatoires* in the progressive development and codification of international law, will not be subject to arbitrary length restrictions;

30. *Welcomes* the institutionalization of the practice of the Secretariat to include on the website of the International Law Commission the provisional summary records in English and French relating to the work of the Commission;

31. *Also welcomes* the efforts of the Secretariat in seeking to ensure the timely and efficient processing of the documents of the International Law Commission and the institutionalization of the experimental measures taken during the sixty-eighth session of the Commission to streamline the editing of those documents;

32. *Takes note* of paragraph 385 of the report of the International Law Commission, underlines the importance of the publications of the Codification Division to the work of the Commission, welcomes in particular the issuance of the ninth edition of *The Work of the International Law Commission* in French, and reiterates its request that the Secretary-General continue to publish *The Work of the International Law Commission* in all six official languages at the beginning of each quinquennium, the *Reports of International Arbitral Awards* in English or French and the *Summaries of the Judgments, Advisory Opinions and Orders of the International Court of Justice* in all six official languages every five years;

33. *Also takes note* of paragraph 390 of the report of the International Law Commission, stresses the unique value of the *Yearbook of the International Law*

[13] A/CN.4/710.

[14] See resolutions 32/151, para. 10, and 37/111, para. 5, and all subsequent resolutions on the annual reports of the International Law Commission to the General Assembly; see also *Yearbook of the International Law Commission 1982*, vol. II (Part Two), paras. 267–269 and 271, as well as all subsequent annual reports of the International Law Commission.

[15] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 183.

*Commission*, and requests the Secretary-General to ensure its timely publication in all official languages;

34. *Expresses its appreciation* to Governments that have made voluntary contributions to the trust fund on the backlog relating to the *Yearbook of the International Law Commission*, and encourages further contributions to the trust fund;

35. *Takes note* of paragraph 391 of the report of the International Law Commission, expresses its satisfaction with the remarkable progress achieved in the past few years in reducing the backlog of the *Yearbook of the International Law Commission* in all six languages, welcomes the efforts made by the Division of Conference Management of the United Nations Office at Geneva, especially its Editing Section, in effectively implementing relevant resolutions of the General Assembly calling for the reduction of the backlog, encourages that Division to provide continuous necessary support to the Editing Section in advancing the *Yearbook of the International Law Commission*, and requests that updates on progress made in this respect be provided to the Commission on a regular basis;

36. *Welcomes* the continuous efforts of the Codification Division to maintain and improve the website relating to the work of the International Law Commission;

37. *Expresses the hope* that the International Law Seminar will continue to be held in connection with the sessions of the International Law Commission and that an increasing number of participants representing the principal legal systems of the world, including in particular those from developing countries, will be given the opportunity to attend the Seminar, as well as delegates to the Sixth Committee, and appeals to States to continue to make urgently needed voluntary contributions to the United Nations trust fund for the International Law Seminar;

38. *Requests* the Secretary-General to provide the International Law Seminar with adequate services, including interpretation, as required, and encourages him to continue to consider ways to improve the structure and content of the Seminar;

39. *Underlines* the importance of the records and topical summary of the debate in the Sixth Committee for the deliberations of the International Law Commission, and in this regard requests the Secretary-General to forward to the Commission, for its attention, the records of the debate on the report of the Commission at the seventy-third session of the General Assembly, together with such written statements as delegations may circulate in conjunction with their oral statements, and to prepare and distribute a topical summary of the debate, following established practice;

40. *Requests* the Secretariat to circulate to States, as soon as possible after the conclusion of the session of the International Law Commission, chapter II of its report containing a summary of the work of that session, chapter III containing the specific issues on which the views of Governments would be of particular interest to the Commission and the draft articles adopted on either first or second reading by the Commission;

41. *Also requests* the Secretariat to make the complete report of the International Law Commission available as soon as possible after the conclusion of the session of the Commission for the consideration of Member States with due anticipation and no later than the prescribed time limit for reports in the General Assembly;

42. *Encourages* the International Law Commission to continue to consider ways in which specific issues on which the views of Governments would be of

particular interest to the Commission could be framed so as to help Governments to have a better appreciation of the issues on which responses are required;

43. *Recommends* that the debate on the report of the International Law Commission at the seventy-fourth session of the General Assembly commence on 28 October 2019.

## Draft resolution II
## Subsequent agreements and subsequent practice in relation to the interpretation of treaties

*The General Assembly*,

*Having considered* chapter IV of the report of the International Law Commission on the work of its seventieth session,[1] which contains the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties,

*Taking note* of the recommendation of the International Law Commission contained in paragraph 49 of its report,

*Emphasizing* the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

*Noting* that the subject of subsequent agreements and subsequent practice in relation to the interpretation of treaties is of major importance in international relations,

1. *Welcomes* the conclusion of the work of the International Law Commission on subsequent agreements and subsequent practice in relation to the interpretation of treaties, and its adoption of the draft conclusions and commentaries thereto;[2]

2. *Expresses its appreciation* to the International Law Commission for its continuing contribution to the codification and progressive development of international law;

3. *Takes note* of the statements in the Sixth Committee on the subject, including those made at the seventy-third session of the General Assembly,[3] after the International Law Commission had completed its consideration of this topic in accordance with its statute;

4. *Also takes note* of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the text of which is annexed to the present resolution, with the commentaries thereto, brings them to the attention of States and all who may be called upon to interpret treaties, and encourages their widest possible dissemination.

### Annex
### Subsequent agreements and subsequent practice in relation to the interpretation of treaties

### Part One
### Introduction

### Conclusion 1
### Scope

The present conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

---

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10).

[2] Ibid., para. 52.

[3] See A/C.6/73/SR.20, A/C.6/73/SR.21, A/C.6/73/SR.22, A/C.6/73/SR.23, A/C.6/73/SR.24, A/C.6/73/SR.29 and A/C.6/73/SR.30; see also the statements in the Sixth Committee that are available on the United Nations PaperSmart portal.

## Part Two
## Basic rules and definitions

### Conclusion 2
### General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided in article 31, paragraph 1.

3. Article 31, paragraph 3, provides, inter alia, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

### Conclusion 3
### Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

### Conclusion 4
### Definition of subsequent agreement and subsequent practice

1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

### Conclusion 5
### Conduct as subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

## Part Three
## General aspects

### Conclusion 6
### Identification of subsequent agreements and subsequent practice

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. Such a position is not taken if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (modus vivendi).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

### Conclusion 7
### Possible effects of subsequent agreements and subsequent practice in interpretation

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 may also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

### Conclusion 8
### Interpretation of treaty terms as capable of evolving over time

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

### Conclusion 9
### Weight of subsequent agreements and subsequent practice as a means of interpretation

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, inter alia, on its clarity and specificity.

2. In addition, the weight of subsequent practice under article 31, paragraph 3 (b), depends, inter alia, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

**Conclusion 10**
**Agreement of the parties regarding the interpretation of a treaty**

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

**Part Four**
**Specific aspects**

**Conclusion 11**
**Decisions adopted within the framework of a Conference of States Parties**

1. A Conference of States Parties, under these conclusions, is a meeting of parties to a treaty for the purpose of reviewing or implementing the treaty, except where they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.

**Conclusion 12**
**Constituent instruments of international organizations**

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31 and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

**Conclusion 13**
**Pronouncements of expert treaty bodies**

1. For the purposes of these conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. This conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates.

## Draft resolution III
## Identification of customary international law

*The General Assembly*,

*Having considered* chapter V of the report of the International Law Commission on the work of its seventieth session,[1] which contains the draft conclusions on identification of customary international law,

*Taking note* of the recommendation of the International Law Commission contained in paragraph 63 of its report,

*Noting* the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available, which surveys the present state of evidence of customary international law and makes suggestions for its improvement,[2]

*Noting also* the bibliography on the subject prepared by the Special Rapporteur,[3]

*Emphasizing* the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

*Noting* that the subject of identification of customary international law is of major importance in international relations,

1. *Welcomes* the conclusion of the work of the International Law Commission on identification of customary international law and its adoption of the draft conclusions and commentaries thereto;[4]

2. *Expresses its appreciation* to the International Law Commission for its continuing contribution to the codification and progressive development of international law;

3. *Takes note* of the statements in the Sixth Committee on the subject, including those made at the seventy-third session of the General Assembly,[5] after the International Law Commission had completed its consideration of this topic in accordance with its statute;

4. *Also takes note* of the conclusions on identification of customary international law, the text of which is annexed to the present resolution, with the commentaries thereto, brings them to the attention of States and all who may be called upon to identify rules of customary international law, and encourages their widest possible dissemination;

5. *Acknowledges* the utility of published digests and surveys of practice relating to international law, including those that make legislative, executive and judicial practice widely available, and encourages States to make every effort to support existing publications and libraries specialized in international law.

---

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10).
[2] A/CN.4/710.
[3] A/CN.4/717/Add.1.
[4] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 66.
[5] See A/C.6/73/SR.20, A/C.6/73/SR.21, A/C.6/73/SR.22, A/C.6/73/SR.23, A/C.6/73/SR.24 and A/C.6/73/SR.29; see also the statements in the Sixth Committee that are available on the United Nations PaperSmart portal.

## Annex
## Identification of customary international law

### Part One
### Introduction

#### Conclusion 1
#### Scope

The present conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

### Part Two
### Basic approach

#### Conclusion 2
#### Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

#### Conclusion 3
#### Assessment of evidence for the two constituent elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

### Part Three
### A general practice

#### Conclusion 4
#### Requirement of practice

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

#### Conclusion 5
#### Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

#### Conclusion 6
#### Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

**Conclusion 7**
**Assessing a State's practice**

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

**Conclusion 8**
**The practice must be general**

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

**Part Four**
**Accepted as law (*opinio juris*)**

**Conclusion 9**
**Requirement of acceptance as law (*opinio juris*)**

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

**Conclusion 10**
**Forms of evidence of acceptance as law (*opinio juris*)**

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

## Part Five
## Significance of certain materials for the identification of customary international law

### Conclusion 11
### Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

### Conclusion 12
### Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

### Conclusion 13
### Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

### Conclusion 14
### Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

**Part Six**
**Persistent objector**

**Conclusion 15**
**Persistent objector**

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

**Part Seven**
**Particular customary international law**

**Conclusion 16**
**Particular customary international law**

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.